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## MEDICAL MALPRACTICE

### How Much Information Is Enough?

Decision explores the meaning of 'informed consent' in the context of abortion

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A recent Appellate Division case considered what information must be provided to a woman prior to the performance of an abortion. *Acuna v. Turkish (Acuna II)*, 384 N.J. Super. 395 (App. Div. 2006). The *Acuna* decision, granted certification by the New Jersey Supreme Court, is an interesting fusion of law, medicine, religion and politics. However, the result may make it impossible for a physician to satisfy a vaguely expanded duty of informed consent to a patient seeking an abortion.

The plaintiff in *Acuna* had been pregnant three times prior to the pregnancy which led to the lawsuit. The plaintiff's first pregnancy ended in a miscarriage and then she gave birth to two daughters. When she became pregnant a fourth time, she consulted the defendant, Dr. Turkish, the obstetrician who had delivered her second child. After examining the plaintiff, the defendant determined that she was six to seven weeks pregnant. The plaintiff alleged that the defendant recommended

termination of the pregnancy because of her renal disease. She claimed that when she asked the defendant if "the baby was already there," the defendant replied, "Don't be stupid, it's only blood." After discussing the situation with her husband, the plaintiff consented to and underwent an abortion.

When she filed suit, the plaintiff alleged that the defendant breached the duty of informed consent and thereby inflicted severe emotional distress by failing to advise the plaintiff that her pregnancy, although in the embryonic stage, i.e., within the first eight weeks, "was a complete, separate, unique and irreplaceable human being" and that "the abortion did not prevent a human being from coming into existence but [was] actually killing an existing human being." The plaintiff also filed wrongful death and survival claims on behalf of "the estate of Michael Doe (fictitious name of a real individual), deceased infant of Rosa Acuna."

The trial court granted summary judgment and dismissed the complaint. The Appellate Division affirmed the dismissal of the wrongful death and survival claims, but reversed the dismissal of the emotional distress claim. *Acuna v. Turkish (Acuna I)*, 354 N.J. Super. 500, 505

(2002). The Court based this decision on well-settled principles of informed consent that require the defendant "to disclose all material information that a prudent patient might find significant in deciding whether or not to terminate her pregnancy."

After the remand, the key testimony during the plaintiff's deposition was her admission she knew that "[E]ventually somewhere down the line I was going to have a baby." However, the plaintiff also stated that although she knew she was pregnant, "I didn't know exactly what was forming inside my body at the moment." Based upon this testimony, a second trial court again dismissed the case, explaining:

This claim must fail since plaintiff understood that she had growing within her a developing human being, that if she continued her pregnancy in the normal course of events she would give birth to a child, and she understood that by agreeing to the procedure to terminate her pregnancy she would not have the child. In light of this, by insisting that the doctor should have told her before the abortion that she was carrying a living human being, plaintiff is attempting to require the doctor to express a moral, philosophical or religious judgment that goes beyond the medical information he is obligated to provide.

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The trial court also observed that information about the "stage of development of her embryo or fetus" was not at issue since the plaintiff took the position that "an abortion at any point in the process would entail killing a family member."

The plaintiff again appealed, contending that although she consented to the abortion, "she was given insufficient information by Turkish to allow her to make an intelligent, informed decision regarding the abortion." The plaintiff argued that the defendant had a duty to explain that "the life of an existing family member will be terminated," because the Appellate Division had already held in *Acuna I* "that a doctor must disclose that a pregnant mother's unborn child is in existence before she can make an informed decision..."

Observing that "this premise is inconsistent with our prior holding," the Appellate Division again reversed, and took pains to note that the reversal was "for entirely different reasons than those advanced in *Acuna's* brief." The court reiterated that the standard to be applied in an informed consent case is "an objective one...derived from what a reasonably prudent patient would deem to be significant to a decision rather than what any particular patient believes," citing *Canesi v. Wilson*, 158 N.J. 490 (1999) and *Largey v. Rothman*, 110 N.J. 204, 213 (1988).

The court then instructed: "The issue presented here is quite narrow, i.e., what medical information is material and must be disclosed by an obstetrician when advising a patient to terminate a pregnancy and what medical information is material when the patient asks if the 'baby' is already 'there?'" As such, the requirement that the doctor discuss "the status of the fetus" was the result of the direct inquiry by the plaintiff regarding the status of the fetus. "Here, *Acuna* alleges that her consent to an abortion was "uninformed" because Turkish failed to accurately answer her question, "[I]s the baby already there?" The court held that in this limited context the nature of the information that must be provided is an issue of fact to be determined by the jury. The court concluded that if the plaintiff's version of the facts

are accepted as true, "summary judgment was inappropriate because a reasonable patient would not have received the information necessary to make an informed decision."

However, the decision never addressed the key question: What "material medical information" could have been provided but was not? The plaintiff knew she was pregnant, and knew if she did not have an abortion she "was going to have a baby." The Appellate Division had explicitly rejected the plaintiff's contention that the defendant had a duty to explain that "the life of an existing family member will be terminated." The court also rejected the plaintiff's contention that the defendant should have told her that the embryo "was a complete, separate, unique and irreplaceable human being" and that "the abortion did not prevent a human being from coming into existence but [was] actually killing an existing human being." However, the court never addressed what information should or even could have been provided.

*Acuna II* leaves one to wonder how a physician satisfies the duty to provide informed consent to a woman who is contemplating terminating her pregnancy. Obviously, to impose a duty upon a doctor to explain that "the abortion...[was] actually killing an existing human being" would be to compel the doctor to make profound moral, religious and political judgments. However, if the quantum of disclosure is somewhere between "You are seven weeks pregnant" and "Your fetus is an existing human being," then what must be said, and where does one draw the line? Must a physician now explain the process of the fusion of genetic material from the sperm and egg? Must there be a description of the development of each of the organs at that point in the pregnancy? Must there be a full discussion of human embryology?

Clearly not all information must or even can be conveyed in every case. For example, the courts have held that the duty of informed consent does not extend to information about what diagnostic testing is available. See *Eagel v. Newman*, 325 N.J. Super. 467 (App. Div. 1999) and *Farina v. Kraus*, 333 N.J. Super. 165 (App. Div. 2000), which explained that "A mal-

practice defendant does not have a duty to discuss every possible non-invasive, risk-free diagnostic or laboratory test with a patient and secure a consent to or a waiver thereof."

This must be so because a doctor could not possibly always explain all available diagnostic tests in all cases. No physician could ever satisfy that standard of informed consent.

Similarly, no physician could ever satisfy the standard of informed consent imposed by the court's decision in *Acuna II*. The decision may expose doctors to unquantifiable liability, for no amount of information will be sufficient to satisfy all potential plaintiffs. One can easily envision some women, particularly those who feel guilty or become opposed to abortion after having the procedure, contending that the doctor did not provide enough information and therefore they terminated what would have been their child. Other women may contend that the doctor gave too much information, intending to persuade them not to terminate, resulting in the decision not to terminate the pregnancy.

Physicians, left wondering whether they must now conduct a course in fetal growth and development for any woman considering an abortion, will have good reason to fear that they cannot satisfy the requirements of providing informed consent. In fact, leaving the issue of what information must be conveyed to a woman contemplating an abortion to the jury will no doubt result in inconsistent results from a case-by-case resolution of this issue.

Given the plaintiff's admission that she knew she would have a baby if she did not terminate, and the fact that she already gave birth to two children, it is hard to imagine that this plaintiff could ever satisfy the requirements of proximate cause. Nevertheless, if left to stand, the *Acuna II* decision may well result in the decreased ability of women to find a doctor who is willing to terminate a pregnancy and increased medical malpractice insurance rates for those doctors who are willing to perform abortions. Based upon a review of the politically charged complaint in the *Acuna* case, it appears that this was in fact the actual goal of the plaintiff. ■